

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NUMBER 13 CVS 454

COUNTY OF HENDERSON,
Plaintiff,

v.

SEVEN FALLS LLC, *et al.*,
Defendants

MOTION FOR CONTINUANCE

FILED
2015 FEB - 6 AM 1:10
HENDERSON CO., C.S.C.

NOW COMES the Plaintiff, Henderson County, and moves the Court as follows:

1. As found in this Court's previous Order herein, entered December 8, 2014:
 5. Because of the lapse in a permit from the United States Army Corps of Engineers (for stream crossings needed in the designed road network within the Subdivision) and the lapse in an agreement with Duke Energy (for the installation of electrical power within the Subdivision), both caused by the Developer's defaults, a significant expenditure for a Corps of Engineers permit (as noted below) will be required to build any of the road network in the Subdivision.
 6. Consultants employed by WGLA¹ estimate that the cost of the Corps of Engineers permit for the Subdivision (in the form of a "remediation fee" paid to the Corps, as opposed to the Corps' favored method of actual off-site wetlands remediation) will be in excess of \$1,100,000.00 (on February 8, 2013, the Corps estimated such fee as \$1,131,500.00), and must be paid prior to any improvement of the road network for the Subdivision.
 7. WGLA estimates that once the remediation fee is paid to the Corps of Engineers, there will be insufficient of the Surety Bond Proceeds remaining to pay for all of the Improvements.
2. Further the Court decreed in said Order:
 1. That the Plaintiff County shall request proposals for the construction of all and various parts of the Improvements as shown on the plans referred to above and found on the website indicated above.
 2. This matter shall come back before this Court for further hearing on February 16, 2015, for the Plaintiff County to present the Court with a recommended plan for the Improvements, or such of them as can be paid for with the remaining Surety Bond Proceeds. At that time all parties will have the right to give input on such plan, or present their own plan, and the Court will make its determination of the plan to be followed for the Improvements.

¹ WGLA is the engineering firm whose use by the Plaintiff has been approved previously by the Court.

3. At such time as bids are received, the County shall post the same on the worldwide web, with links found at <http://www.hcplanning.org/sevenfalls/index.html>. Further, the County shall post notice of its proposed plan upon such website by not later than one week prior to February 16, 2014.

3. In order to provide the Court with all costs related to a recommended plan the County, through the Office of the County Attorney and the County Engineer, spent much time with WGLA in preparing plans and specifications to be submitted to bid. These were in fact subject to a Request for Proposals ("RFP") created by the Plaintiff County. As a part of the RFP process, the County conducted pre-bid meeting with all interested contractors on January 19, 2016.

4. The County also held a meeting with the US Army Corps of Engineers (USACE) and the North Carolina Department of Environment and Natural Resources (NCDENR) on January 22, 2015. Representatives from the County, WGLA and ClearWater Environmental Consultants (the company used by WGLA in obtaining USACE approval for the project) participated in the meeting.

5. At the meeting, the USACE informed the County that contrary to previous discussions, it would not be possible to revive the revoked Seven Falls LLC permit granted by USACE, and it would be necessary for the County to apply for a new Individual Permit. USACE will require a new application and this application must go through the permit review process. At the request of the County, USACE confirmed this in writing to the County by letter dated February 4, 2015, referred to below and attached as an exhibit.

6. The reason a new permit will be required is because the Seven Falls permit was revoked and the scope of the work proposed by the County is different (that is, less) than the original project.

7. WGLA and ClearWater Environmental have estimated it will take approximately 60 days to prepare the application prior to providing it to USACE.

8. USACE states in its letter of February 4, 2015 that the average review process is four to six months though because of the "uniqueness and history of the Seven Falls property" it may take more review and processing time.

9. The County is currently awaiting a final determination from the North Carolina Department of the Environment and Natural Resources Division of Water Quality ("DWQ") as to what would be required to apply for a new permit from the state department. The USACE permit is contingent on a similar parallel process with the state agency.

10. To apply for the USACE, the County must work with WGLA and environmental consultants to do an assessment of the property and determine mitigation measures (on-site) or cost of a fee in lieu of remediation.

11. Construction bids were due back to the County on February 5, 2015.

12. However, based on the USACE permitting process, no construction could start on the project for a minimum of 6 months and possibly 12 months after the bids were returned.

13. To insure the prices provided in potential bids, contractors may require a large contingency which would greatly increase the cost of the project even further beyond the ability of the bonded proceeds to fund.

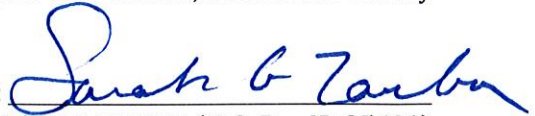
14. The County requests a continuance on this matter in order to give all parties to this matter as much notice as possible regarding the current status of the project.

WHEREFORE, Plaintiff moves the Court to permit it to continue the hearing scheduled herein, and move the matter forward with a new hearing to be noticed after receipt of permits from USACE and DWQ.

This the 6 day of February, 2015.

OFFICE OF THE COUNTY ATTORNEY FOR
HENDERSON COUNTY
Attorneys for the Plaintiff, Henderson County

By:

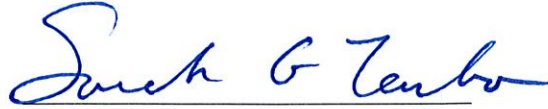


SARAH GRACE ZAMBON (N.C. Bar ID 35680)
Deputy County Attorney
Office of the County Attorney
1 Historic Courthouse Square, Ste 5
Hendersonville, NC 28792
Telephone: (828) 697-4719
Facsimile: (828) 697-4536

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing motion has been served on all parties hereto by depositing a copy of the same in a postage prepaid envelope, properly addressed to the persons and entities listed on the attached pages.

This the 6 day of February, 2015.



Sarah Grace Zambon
Attorney for Plaintiff



**DEPARTMENT OF THE ARMY
WILMINGTON DISTRICT, CORPS OF ENGINEERS
151 PATTON AVENUE
ROOM 208
ASHEVILLE, NORTH CAROLINA 28801-5006**

February 4, 2015

Regulatory Division

Action ID: SAW-2013-01159

Ms. Sarah Zambon, County Attorney
Mr. Russell Burrell, County Attorney
Henderson County
1 Historic Courthouse Square, Suite 5
Hendersonville, North Carolina 28792

SUBJECT: Individual Permit Requirement for Proposed Work within a Portion of the Seven Falls Development, Henderson County

Dear Ms. Zambon and Mr. Burrell:

This letter is in reference to your request via e-mail on January 28, 2015, and our discussions during the pre-application meeting on January 22, 2015, pertaining to Henderson County's proposed submittal of a Department of Army (DA) permit application. Your submittal would request authorization for work previously undertaken as well as additional improvements in jurisdictional waters of the United States (WoUS) located within a portion of the residential development known as Seven Falls, on Pleasant Grove Road in the Etowah community of Henderson County, North Carolina. Specifically, the proposed work involves basic road and utility infrastructure improvements to satisfy the County's obligations under their performance guarantee agreement initially signed with the subdivision's development company, Seven Falls LLC. All proposed activities are located within the Phase I residential building lots south of Pleasant Grove Road, also known as the "bonded area" within the Seven Falls development.

As stated in past discussions with the County, the DA permit previously issued by the Corps to Seven Falls LLC was suspended and subsequently revoked in 2010 as a result of the permittee's continued noncompliance with certain terms and conditions of their permit. As a result, impacts undertaken by Seven Falls LLC remain unauthorized and must be either restored to pre-project conditions or authorized by a new permit.

Based on the County's preliminary plans discussed at the January 22nd pre-application meeting, the change in project scope, and lack of a valid DA authorization, the Corps has determined a new Individual Permit (IP) is required to authorize the previous work and improvements proposed by the County within the bonded area. The County (as the applicant) will need to submit an IP application with all necessary supporting documents including, but not limited to: alternative analysis, design plans/drawings, delineation of aquatic resources within

the project area, compensatory mitigation plan, restoration plan of existing impacts to WoUS within the project area that will not be utilized, and a summary of existing impacts to WoUS in the project area.

IPs are issued for activities that have more than minimal adverse impacts to WoUS and the evaluation of each IP application involves a more thorough review of the potential environmental and socioeconomic effects of the proposed activity. An IP requires a full public interest review, including public notices and coordination with involved agencies, interested parties and the general public. Typically the IP process takes four to six months. However, due to the uniqueness and history of the Seven Falls property, additional permit review and processing time is anticipated.

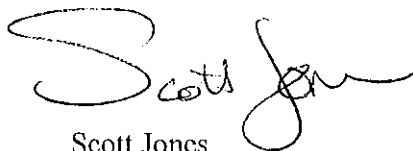
The IP process can be generally summarized as follows:

1. Pre-application coordination;
2. IP application with supporting documents submitted;
3. After receipt of a complete application, Corps issues joint public notice for the Section 404 permit and Section 401 water quality certification;
4. 15-45 day public notice comment period;
5. Opportunity for public hearing, if Corps deems a hearing is in the public's best interest;
6. Corps with the applicant's involvement, reviews comments, evaluates the permit application based on regulations, and completes required documentation; and
7. Corps makes a decision to either issue, issue with conditions, or deny.

An individual State of North Carolina Water Quality Certification is also required for this project and must be issued before a final Corps decision is provided. The North Carolina Department of Environment and Natural Resources, Division of Water Resources, conducts this certification as a requirement of Section 401 of the Clean Water Act.

We appreciate the County's ongoing efforts associated with the Seven Falls site. Should you have any additional questions or concerns, please contact me by phone at 828.271.7980, ext. 222, or via email scott.jones@usace.army.mil.

Sincerely,

A handwritten signature in black ink that reads "Scott Jones". The signature is written in a cursive, flowing style.

Scott Jones
Chief
Asheville Regulatory Field Office

cc:

Mr. Zan Price
North Carolina Division of Water Resources
NCDENR – Asheville Regional Office
2090 U.S. Highway 70
Swannanoa, North Carolina 28778

Mr. Clement Riddle
ClearWater Environmental Consultants, Inc.
224 South Grove Street, Suite F
Hendersonville, North Carolina 28792

Mr. Will Buie
WGLA Engineering
214 North King Street
Hendersonville, North Carolina 28792